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8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION
11

12 CAROLYN ROBB HOOTKINS, et. al.,) Case No. CV07-5696 CAS (MANx)

13)
14 Plaintiffs-petitioners,)

15 vs.)

16 JANET NAPOLITANO, U.S. Department)
17 of Homeland Security, et. al.,)

18 Defendants-respondents.)

Date: April 20, 2009

Time: 10:00 a.m.

Courtroom: 5

Honorable Christina A. Snyder

PLAINTIFFS' REPLY TO

DEFENDANTS' OPPOSITION TO

PLAINTIFFS' RENEWED MOTION

FOR SUMMARY JUDGMENT

CLASS ACTION

1 Defendants restate their position that “the alien is no longer a spouse under the first
2 sentence of section 1151(b)(2)(A)(i), and cannot immigrate unless under the second
3 sentence the alien and the citizen were married for at least two years.” Def. Opp. Pp. 4-7
4 (Dkt # 137). The two year marriage requirement, however, relates directly to the alien’s
5 right to *self-petition* under 8 U.S.C. §1154(a)(1)(A)(ii) (*second clause*), and does not limit
6 those alien spouses on whose behalf a petition was already filed under 8 U.S.C.
7 §1154(a)(1)(A)(i) (*first clause*) by his or her U.S. citizen spouse.

8 Defendants also point to the *Robinson* majority’s flawed holding that “[t]he first
9 sentence of the immediate relative definition cannot be divorced from the second
10 sentence”. *Robinson v. Napolitano*, 554 F.3d 358, 364 (3rd Cir. 2009); Def. Opp. Pp. 7-
11 8 (Dkt # 137). But in the case of the first and second sentences of 8 U.S.C.
12 §1151(b)(2)(A)(i) and the first and second clauses of 8 U.S.C. §1154(a)(1)(A), there was
13 no need for the definitions to be “divorced” from one another because they were never
14 “married” to one another in the first instance. That is because the second clause of 8
15 U.S.C. §1154(a)(1)(A) specifically describes the self petitioning spouse as an “alien
16 spouse described in the second sentence” of 8 U.S.C. §1151(b)(2)(A)(i). Once “[a]ny
17 citizen of the United States claiming that an alien is entitled to...an immediate relative
18 status under section 201(a)(2)(A)(i) [8 U.S.C. §1151(b)(2)(A)(i)]” has complied with the
19 procedural regime and “file[d] a petition with the Attorney General for such
20 classification” the alien beneficiary of that petition comes within the first, not the second,
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1 sentence of 8 U.S.C. §1151(b)(2)(A)(i). *See* 8 U.S.C. §1154(a)(1)(A)(i).

2 During oral argument in *Robinson*, Judge Sloviter asked whether the analysis
3 would change if a “comma” were inserted between the first and second sentences of 8
4 U.S.C. §1151(b)(2)(A)(i). That valid question went without satisfactory response by
5 counsel for Mrs. Robinson, but the answer is apparent from the words of the statute. If a
6 comma were inserted, then reference in 8 U.S.C. §1154(a)(1)(A)(ii) to “[a]n alien spouse
7 described in the *second* sentence” would lose its meaning entirely. It is clear from a
8 review of the statutory scheme in its entirety that the first and second sentences of 8
9 U.S.C. §1151(b)(2)(A)(i) were never intended by Congress to limit the other. In the view
10 of the *Freeman* Court, the regulations governing petition procedure are consistent with
11 the statute and are “consistent with a congressional intent to create two different
12 processes, such that one or the other applies – either the citizen spouse petitions, or, if he
13 dies without doing so, the alien widow may do so.” *Freeman v. Gonzales*, 444 F.3d
14 1031, 1042 (9th Cir. 2006). Moreover, the court held that,

15 There is no provision that the citizen spouse’s pending petition (and
16 consequently the alien spouse’s immediate relative status) is voided on his
17 death, requiring the widow to start over with her own self-petition.

18 *Id.* Given the fact that Defendants are unable to cite to any provision that voids the
19 citizen spouse’s pending petition upon death, and given the undeniably harsh
20 consequences of voiding such a petition, the conclusion to be drawn from the absence of
21 a provision voiding a pending petition automatically upon the petitioner’s death is that
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1 Congress never intended such a result.

2 Defendants argue that the verb tense used in 8 U.S.C. §1154(b) requires Plaintiffs
3 “to be *current* spouses at the time of adjudication – not only at the time of filing – of their
4 I-130 petitions in order to be eligible for immediate relative status.” Def. Opp. P. 9 (Dkt.
5 #137). Plaintiffs counter that nothing in the statute voids their status as spouses, and
6 therefore classification as immediate relatives, when they outlive their spouses. Further,
7 Defendants reliance on *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992) is misplaced
8 because *Alarcon* has nothing to do with an I-130 adjudication (which *does not* involve
9 admissibility determinations). Once eligibility for *classification* as an immediate relative
10 is determined without the taint of admissibility concerns prohibited by *Matter of O*, 8
11 I&N Dec. 295 (BIA 1959), then and only then may admissibility be reviewed under the
12 provisions of 8 U.S.C. §1182.
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18 Through their own recent actions, Defendants have conceded that an I-485
19 adjustment of status application (which *does* involve admissibility determinations) may
20 be granted to a surviving spouse who was not married for two years at the time of the
21 citizen spouse’s death, but whose citizen spouse filed the necessary I-130 petition. See
22 Pl. Resp. Def. Mot. Partial S.J., Exhibit A (Dkt. #140-2). Plaintiff Walsh is now an LPR,
23 having been given the classification of an immediate relative spouse of a United States
24 citizen who adjusted status (Class of Admission (“COA”) IR6).
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28 Plaintiff Walsh’s case does not arise within the Ninth Circuit’s jurisdiction. It is

1 undisputed that, at the time that her later-filed I-485 adjustment of status application was
2 approved on March 13, 2009, that her husband was deceased. Defendants' own action in
3 Plaintiff Walsh's case to approve an I-485 application for an alien who Defendants
4 apparently believe is no longer the spouse of a United States citizen undermines their
5 position. It defies logic that Defendants can approve an I-485 application for adjustment
6 of status for an alien spouse who they deem not to be a spouse any longer, and
7 automatically deny or revoke an I-130 petition under the same circumstances. Contrary
8 to Defendants' position, therefore, it must be because Defendants deem Plaintiff Walsh *to*
9 *be* and *to remain* a spouse for purposes of immediate relative classification.
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14 Defendants argue that death terminates marriage, and therefore the surviving
15 spouse can no longer be considered a spouse because he or she is no longer married. Def.
16 Opp. pp. 11-12 (Dkt. #137). This argument ignores the fact that 8 U.S.C. §
17 1154(a)(1)(A)(ii) refers to a second sentence spouse (necessarily a widow or widower) as
18 "an alien spouse" and that within the second sentence of 8 U.S.C. § 1151(b)(2)(A)(i) the
19 statute refers to a widow or widower twice – as "the spouse". See also *Robinson, supra*,
20 554 F.3d at 369 (Nygaard, J., dissenting) (noting the words "the spouse" in the statute
21 referring to the self-petitioning widow or widower). Congress clearly intended a widow
22 or widower to be considered "an alien spouse" and did not intend the termination of the
23 marriage by death to strip the status as spouse. The term spouse refers to the person, as
24 opposed to the marital state. See *Goeller v. Lorence*, 9th Dist. No. 06-CA-008883, 2006-
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1 Ohio-5807, Vinton App. No. 08-CA-666 (Ohio Ct. App. 2006), citing *Trathen v. United*
2 *States*, 198 F.2d 757, 759 (3rd Cir. 1952). A spouse who outlives the other spouse is
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4 nevertheless a spouse.

5 Defendants argue that the agency's interpretation is entitled to deference under
6 *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Def.
7 Opp. pp. 13-14. This argument was squarely rejected by *Freeman*, the *Robinson* majority
8 was careful not to explicitly rely on deference to *Varela*, and the dissent specifically
9 rejected *Chevron* deference. *Robinson, supra*, 554 F.3d at 368. *Chevron* is not
10 implicated here.

11 Defendants also argue that subsequent Congressional action justifies their position.
12 Def. Opp. p. 14 (Dkt. #137). Plaintiffs previously responded to these arguments. Pl.
13 Renewed Mot. S.J. pp. 2-10 (Dkt. #114). Defendants also claim that *Freeman* is
14 inconsistent with Ninth Circuit precedent. Def. Opp. p. 14 (Dkt #137). Plaintiffs
15 previously responded to these arguments. Pl. Resp. Def. Mot. Partial S.J. p. 1 (Dkt.
16 #139). Defendants further state "[w]hen the citizen spouse is still alive, USCIS has the
17 opportunity to fully test the bona fides of the marriage by completing an investigation,
18 including an interview of the applicant and, if necessary, the citizen spouse...By contrast,
19 when the citizen spouse has died, USCIS is unable to fully investigate the bona fides of
20 the marriage, and the statute therefore imposes a two-year marriage requirement to ensure
21 that only surviving spouses in bona fide marriages adjust to Lawful Permanent Resident."
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1 Def. Opp. p. 15 (Dkt. #137). The implication of Defendants' argument is that USCIS is
2 "unable" to complete the investigation of the bona fides of the marriage where death
3 occurs prior to an interview of the citizen spouse, and that they must necessarily and
4 automatically void such a petition. This implication must be rejected. USCIS approves
5 tens of thousands of I-130 petitions for spouses of United States citizens every year
6 without interview.¹ Additionally, the citizen petitioner in *Lockhart* was interviewed,
7 additional evidence requested by USCIS and submitted, but the agency still failed to act
8 before Mr. Lockhart's death *eight months after interview* and automatically terminated
9 the petition due solely to the death. *Lockhart v. Chertoff*, 2008 U.S. Dist. LEXIS 889 (D.
10 Ohio 2008), *appeal docketed*, No. 08-1179 (6th Cir. 2008). Defendants' ability to
11 conduct the investigation does not, therefore, turn upon an interview. While Defendants
12 would like to cloak their automatic revocation policy behind the "investigation," the fact
13 remains that Plaintiffs may have their cases reviewed based on all the evidence and
14 indicia of a bona fide marriage, just as the tens of thousands of other applicants whose
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21 ¹ In 2007, USCIS processed 35,222 "IR1" (married over two years) and 27,036 "CR1"
22 (married less than two years) spouses of U.S. citizens as "new arrivals" through consular
23 processing whereby the I-130 petitioner is not interviewed (like Plaintiff Walsh's case),
24 and processed 62,894 "IR6" (married over two years) and 115,956 "CR6" (married less
25 than two years) spouses of U.S. citizens as "adjustment of status" where an interview is
26 usually scheduled. The Yearbook of Immigration Statistics, Department of Homeland
27 Security, Table 7, Persons Obtaining Legal Permanent Resident Status by Type and
28 Detailed Class of Admission Fiscal Year 2007 is available at
<http://www.dhs.gov/ximgtn/statistics/publications/LPR07.shtm> (last visited April 6,
2009)

1 citizen spouses are not interviewed may.

2 Defendants argue that the final affidavit of support rule, 71 Fed. Reg. 35732 (June
3 21, 2006), supports Defendants' position, and that the rule represents an explicit
4 validation by Defendants of the holding in *Varela*. Def. Opp. p. 16 (Dkt #137).
5 Defendants do not explain how this allows *Chevron* to operate. Further, as stated by the
6 dissent in *Robinson*,

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9 In *Chevron* the Court ruled that when Congress explicitly or implicitly
10 delegates authority to an executive agency to develop regulations and
11 practices to fill the interstices in the law, the courts must defer to them... In
12 *Chevron* Congress had failed to define a term. The EPA promulgated
13 detailed regulations and national standards defining the term at issue. The
14 Court held that because the regulatory scheme was 'technical and complex,'
15 the agency 'considered the matter in a detailed and reasoned fashion, and the
16 decision involve[d] reconciling conflicting policies,' courts must defer to the
17 technical expertise of the agency. *Chevron*, 467 U.S. at 865, 104 S.Ct. 2778.
18 Here Congress provided us with a definition of 'immediate relative' and had
19 no reason to delegate, explicitly or implicitly, any further authority to the
20 executive department to further tweak the definition. The words and phrases
21 at issue are not technical. The agency has no relevant expertise to more fully
22 define them for us. There is no legislative history to suggest there existed
23 any controversy which Congress referred to the agency to resolve.

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25 *Robinson*, 554 F.3d at 368 (Nygaard, J., dissenting). There being no lack of a definition
26 for the agency to fill with regulations, such regulations are of no effect on Congress'
27 choice of words.

28 Defendants argue that their long-standing administrative interpretation should be
afforded deference. Def. Opp. pp. 16-17 (Dkt. #137). Longevity of the policy underlying
the statutory interpretation is no cure to the defect in that interpretation. As the D.C.

1 Circuit recently recognized, “such deference must still yield to the plain meaning of the
2 statute.” Port Authority of New York and New Jersey v. Department of Transportation,
3 479 F.3d 21, 32 (D.C. Cir. 2008). Here, the plain meaning of the statute is clear and
4 Plaintiffs are, as a matter of law, entitled to “immediate relative” classification under the
5 statute.
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8 Defendants argue that their interpretation is consistent with the purpose of family
9 based immigration policy. Def. Opp. pp. 17-18 (Dkt. #137). Defendants state that
10 “[o]nce the U.S. citizen passes away, that purpose is no longer necessarily served by
11 giving the alien widow the ability to adjust her status.” Id. First, the core purpose of the
12 Immigration and Nationality Act was to enact a comprehensive immigration statute, not
13 merely to promote family unity.² Second, as the *Robinson* majority stated, “Admittedly,
14 inclusion of a surviving spouse as an immediate relative if s/he was married for two years
15 also does not promote unification of the marital unit...” *Robinson*, supra, 554 F.3d at
16 367. The inclusion of a surviving spouse self-petitioning option undermines Defendants
17 position that statutory provisions must somehow meet the goal of family unity or be
18 rejected. Third, allowing the U.S. citizen’s express wish, through the filing of an I-130
19 immigrant petition on behalf of his or her spouse, to be fulfilled by granting his or her
20 spouse immediate relative classification does, in fact, promote family unity. In many
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² Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163, legislative history, “PURPOSE OF THE BILL: The purpose of the bill is to enact a comprehensive, revised immigration, naturalization, and nationality code.”

1 cases there are children born of the marriage, and grandparents who wish to see their
2 deceased son or daughter's children remain with them as a family unit in the United
3 States. The goal of family unity is accomplished by respecting the wishes of the
4 American citizen petitioner who properly filed the petition requesting classification of his
5 or her spouse as an immediate relative and not automatically terminating it because of
6 bureaucratic delays and the happenstance of death.
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9 Defendants argue that they properly require a substitute affidavit of support
10 sponsor after the death of the petitioner. Def. Opp. pp. 18-19 (Dkt. #137). Plaintiffs
11 addressed these arguments previously. Pl. Resp. to Def. Mot. Partial S.J. pp. 2-9 (Dkt.
12 #139). With regard to Defendants' argument that Congress has "endorsed and ratified the
13 principle that approval of a visa petition is revoked automatically if the petitioner dies,"
14 Def. Opp. pp. 19-20 (Dkt. #137), no such endorsement or ratification occurred. In the
15 case of *Lorillard v. Pons*, 434 U.S. 575 (1978), the Supreme Court held that the right to a
16 jury trial in actions under the FLSA was well established, and that every court to have
17 considered the issue had so held, and further that the re-enactment of a statute without
18 speaking to the jury trial issue was an endorsement of the right to jury trial. In the case of
19 automatic revocation rules, however, the only courts of appeal to have reviewed the
20 revocation provisions have actually rejected them. See *Leano v. INS*, 460 F.2d 1260 (9th
21 Cir. 1972); *Pierno v. INS*, 397 F.2d 949 (2d Cir. 1968). Since Congress is presumed to
22 have known about the *Leano* and *Pierno* decisions, it may also be said that Congress
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1 ratified the principles in those decisions, and endorsed the view that death of the
2 petitioner is not good and sufficient cause to automatically revoke the approval of a
3 petition.
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5 Defendants argue that Plaintiff Nguyen cannot qualify for adjustment of status.
6 Def. Opp. pp. 21-23 (Dkt. #137). Plaintiffs addressed these arguments previously. Pl.
7 Resp. to Def. Mot. Partial S.J. pp. 15-16. Additionally, Defendants fail to highlight the
8 “to” in the statute which requires the K-1 visa entrant to adjust status based on
9 “to” in the statute which requires the K-1 visa entrant to adjust status based on
10 “marriage...to the U.S. citizen who filed the petition”.
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12 Defendants argue that Plaintiffs Lockett and De Mailly have abandoned their
13 adjustment of status applications. For the reasons stated in Plaintiffs’ Response (9th
14 Cir.), Defendants arguments fail. See Pl. Resp. to Def. Mot. S.J. pp. 16-17 (Dkt. #139).
15 With respect to Defendants’ arguments regarding Plaintiffs Standifer, Heard, Lu and
16 Walsh, Plaintiffs refer the Court to the argument of these issues in Plaintiffs’ Response
17 (Non-9th Cir.). See Pl. Resp. to Def. Mot. S.J. pp. 16-19 (Dkt. #140).
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20 DATED April 6, 2009.
21

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1 PROOF OF SERVICE

2 I, the undersigned, say: On April 6, 2009, true and correct copies of the plaintiffs':
3 PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS'
4 RENEWED MOTION FOR SUMMARY JUDGMENT, were served pursuant to the
5 district court's ECF system as to ECF filers to the following ECF filers:

6 Elizabeth Stevens
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18 I declare under penalty of perjury under the laws of the United States of America
19 that the foregoing is true and correct.

20 EXECUTED on April 6, 2009, at Lake Oswego, Oregon.

21 /s/ Brent W. Renison
22 Brent W. Renison, Declarant
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